Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 21 MARCH 25, 1987 No. 12

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

19 CFR Part 134

(T.D. 87–29)

COUNTRY OF ORIGIN MARKING OF CERTAIN UNFINISHED SWEATERS; CHANGE OF POSITION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document gives notice that Customs is rescinding its previous rulings that New Zealand is the correct country of origin of sweaters made by sending New Zealand yarn to the People's Republic of China where it was knitted into sweater parts, which were partially sewn together and then returned to New Zealand where they were finished by completing the sewing and subjecting the garments to a process called "Super Wash".

After reviewing the comments received in response to the notice proposing this change, as well as the applicable law and judicial decisions, Customs now believes that the completion of the sewing and the "Super Wash" process do not result in a substantial transformation of the partially completed garment. Therefore, without a substantial transformation, the country of origin of the seaters is the People's Republic of China, not New Zealand and the sweaters must be so marked.

EFFECTIVE DATE: This ruling shall be effective as to merchandise entered, or withdrawn from warehouse, for consumption on or after June 11, 1987.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that all articles of foreign origin, or their containers, imported into the U.S., shall be legibly and conspicuously marked to

indicate the English name of the country of origin to an ultimate purchaser in the United States, unless specifically exempted. Part 134, Customs Regulations (19 CFR Part 134), sets forth the country of origin marking requirements. Section 134.1(b), Customs Regulations (19 CFR 134.1(b)), defines "country of origin" as the country of manufacture, production or growth of any article of foreign origin entering the U.S. Further work or material added to an article in a second country must effect a substantial transformation in order to render that country the "country of origin" within the meaning of section 134.1(b).

The importance of determining an article's correct country of origin lies not only in informing the ultimate purchaser, but also in the effect it has on any import quota that may pertain to that article. An import quota is a quantity control system, usually based on bilateral agreements with the countries concerned, which limits the amount of certain merchandise that may enter the U.S. from a foreign country. Quotas vary according to the country from which the merchandise is exported, and the specific type of merchandise involved.

An article which enters the U.S. marked with the wrong country of origin may be incorrectly charged to that country's import quota. The incorrectly marked articles may cause the quota for that country to fill faster than it should, resulting in fewer articles entering the U.S. from the exporting country that would otherwise be permitted. Conversely, more articles than the quota permits may enter the U.S. from the actual country of origin. Wool sweaters which are the product of the People's Republic of China are subject to quota restraints agreed upon in a bilateral agreement between that country and the U.S., but wool sweaters which are the product of New Zealand are not subject to quota restraints.

The finishing process used by New Zealand sweater producers on sweaters they export to the U.S. has aroused a controversy concerning the sweaters' correct country of origin. These producers purchase raw New Zealand wool and have it spun into yarn and dyed in New Zealand. They then send the yarn on consignment to the People's Republic of China where it is knitted into sweater parts, namely the fronts, backs and sleeves, which are joined together at the shoulders. The partially joined parts are returned to New Zealand to be finished into sweaters by sewing the two side seams, each of which extends through the armpit area and along the sleeve to the sleeve end; being subjected to a proprietary process called "Super Wash;" and when specifications so require, adding buttons, zippers, shoulder pads, elbow pads, etc.

It is Customs understanding that the function of the "Super Wash" process is to chemically treat the wool material so that the finished garment may be cleaned in a household washing machine. "Super Wash" is also supposed to assist in the sizing of the gar-

ment, and give it a softer touch, lighter color and greater durability than it would otherwise have had had it not undergone this process.

In Customs Ruling (CR) #719580 dated June 15, 1982, and in CR #716351, dated July 20, 1981, the issue before Customs was whether the importer's process of sewing, "Super Washing" and otherwise finishing the sweaters in New Zealand effected a substantial transformation of the sweater from unfinished parts into a finished garment. Without a substantial transformation, the country where the parts were originally produced and partially joined is the country of origin, not New Zealand where the sweater was completed. Customs held that the completion of the sewing, "Super Washing" and other finishing in New Zealand, was, in fact, a substantial transformation.

The U.S. Department of Commerce has requested that Customs reconsider these rulings on the basis that the completion of the sewing and the "Super Wash" processing do not result in a substantial transformation. Commerce believes that New Zealand is not the correct country of origin and as a result, these incorrectly marked sweaters are entering the U.S. free of the textile import quotas imposed on sweaters of Chinese origin. In view of the concern of the Commerce Department, Customs, by a notice published in the Federal Register on January 30, 1984 (49 FR 3671), determined that a review of the above rulings was warranted and invited public comments on them before any change was made.

Discussion of Comments

Twenty comments were received in response to the notice, ten favored rescinding Customs previous rulings, ten opposed. Those in favor argue that the operations performed in New Zealand do not effect a substantial transformation of what is essentially a Chinese garment. They state that a minor assembly and a finishing operation in an intermediate country does not constitute a substantial transformation. In support of their position, these commenters cited several Customs rulings and court cases, among them *Uniroyal Inc.* v. *United States,* 542 F. Supp. 1026 (C.I.T. 1982), *aff'd* 702 F. 2nd 1022 (C.A.F.C. 1982), in which the U.S. Court of International Trade held that, for country of origin marking purposes, Indonesian footwear uppers were not substantially transformed in the U.S. by domestic processing which included attachments of outsoles to the imported uppers. The court noted that the footwear uppers had already attained their ultimate shape, form, and size in Indonesia, and that the domestic addition of the outsole was a relatively minor operation.

By analogy, it was stated that each of the four sweater sections (front, back, right sleeve, left sleeve) is precisely knit in China to constitute an integral part of a predetermined shaped and sized sweater and that this, combined with the joining of the part in China, creates a substantially complete sweater. Furthermore, the

partial assembly in China is accomplished by looping the parts together at the shoulder and neck on a "looping" machine operated by a highly skilled worker. In contrast, the final seaming in New Zealand is performed on a "cup seaming" machine which is not as sophisticated as a "looping" machine and is an operation which requires substantially less skill.

Also cited is the case of *United States* v. *100 Pieces, More or Less, Style 200 Artificial Knees,* 283 F. Supp. 409 (C.D. Calif. 1968), in which East Germany was held to be the country of origin of artificial knees originating in East Germany, but shipped to Switzerland for finishing and minor assembly operations. The court held that no substantial transformation occurred in Switzerland.

The Customs rulings on the issue that have been cited in favor of rescinding these rulings include: CR #710564 (assembly of ceiling fan components held not to effect substantial transformation where assembly process was perfunctory and more in the nature of a combining process); CR #712545 (alteration of an already finished sewing machine held not to be a substantial transformation); CR #710586 (cutting, sewing, and finishing of piece goods into terry cloth towels will effect a substantial transformation, but sewing of pre-cut towels will not); CR #056570 (assembly of sandals in Hong Kong from parts from Taiwan did not result in Hong Kong sandals where all parts necessary to complete the sandal were produced in Taiwan). It is pointed out that no new components are added in New Zealand and that all the parts necessary to complete the sweaters are produced in China.

On the question of the "Super Wash" chemical treatment performed in New Zealand, the Supreme Court decision of *Anheuser-Busch Brewing Ass'n* v. *United States,* 207 U.S. 556, 28 S.Ct. 204 (1908), has been cited for the proposition that, in order for a substantial transformation to occur, a new and distinctive article must emerge having a new name, character, or use. In that decision, the Court rejected the claim that corks, subjected to a special (secret) chemical processing, were substantially transformed. A cork put through the claimant's process, the Court observed, is still a cork. Throughout the years, courts have held that various chemical treatments did not work a fundamental change in an article: *Howard Hardy & Co. Inc.* v. *United States,* T.D. 48441 (Cust. Ct. 1936), where "imperial finishing," a shrinkage process, did not cause a substantial transformation; *Amity Fabrics Inc.* v. *United States,* 43 Cust. Ct. 64, C.D. 2104 (1959), which held that dyeing a dyed fabric did not create a new article and, therefore, was a mere alteration; and *John J. Coates* v. *United States,* 3 Cust. Ct. 193, C.D. 232 (1939), where dyeing dresses was held not be a substantial transformation.

To further strengthen their position, the commenters in favor of rescission cited section 308 of the Trade Agreements Act of 1979 (19 U.S.C. 2518) which contains the Rule of Origin which further defines the substantial transformation test, the crucial concept upon

which this case turns. In this statute, it is stated that "An article is a product of a country or instrumentality only if * * * in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed." The commenters pointed out that this rule was designed to prevent the evasive practice of transshipment through an intermediate country where minor processing may occur. Finally, it was also stated that under Department of Commerce export classification procedures, garment parts are tantamount to the article itself.

The commenters opposing any change in Customs current position argue that a substantial transformation occurs in New Zealand and cite several recent decisions of the U.S. Court of International Trade as well as several recent Customs rulings to support their position.

One case cited several times by opposing commenters was *Cardinal Glove Co., Inc.* v. *United States;* 4 C.I.T. 41 (1982). In *Cardinal Glove,* the court determined that cotton gloves assembled in Haiti from front and back panels manufactured in Kong Kong did not require an export license (visa) from Hong Kong because Haiti was the country of exportation. The court also made a finding, although possibly dictum, that an assembly in Haiti constituted a substantial transformation of the merchandise.

Also cited is the subsequent decision of the Court of International Trade in *Belcrest Linens* v. *United States,* Slip Op. 83–107 (1983), in which the court held a pillowcase to be a product of Hong Kong, the country where Chinese fabric was cut at predetermined markings, scalloped, sewed, and hemmed. As it did in *Cardinal Glove,* the court decided the case on a country of exportation principle. In addition, the court indicated that the Chinese fabric underwent a substantial transformation in Hong Kong.

It is urged that the processing of the sweater parts in New Zealand clearly exceeds in degree the processing considered in *Cardinal Glove* and *Belcrest Linens* and that the subject finished sweaters are new and different articles of commerce as opposed to sweater parts. As one commenter points out, knitted pieces cannot be called sweaters, used as sweaters, or sold as sweaters. The identity of sweaters is conferred in New Zealand, not China.

One of the commenters notes that the original wool used to knit the sweater parts in China, is derived from New Zealand sheep, spun into yarn and dyed in New Zealand. In fact, as another commenter points out, New Zealand has more to do with production of the sweaters than China from a cost analysis perspective, *i.e.,* 65 percent of the value of the sweater is claimed to be added in New Zealand, including the cost of the New Zealand wool (50 percent if the cost of the wool is excluded). Only 35 percent of the value of the

sweater is said to be attributable to knitting of the sweater shapes in China. According to *United States* v. *Murray*, 621 F.2d 1163 (1st Cir. 1980), enhancement of value is a key element in deciding whether a substantial transformation has occurred. The *Murray* case was also cited by commenters favoring the change of practice. Appropriately enough, commenters opposing the change also cited the Supreme Court case of *Anheuser-Busch* for the proposition that if processing of an article occurs in two or more countries, the article is considered for tariff purposes to be a product of the last country in which the processing created a new and different article.

The commenters opposed to the change also cite recent Customs decisions to the effect that assembly of a garment constitutes a substantial transformation. For instance, C.S.D. 80–10 (CR #059089) held that Hong Kong was the country of origin of five or six Taiwanese separate sweater parts shipped to Hong Kong for assembly into a completed garment. It is also contended that C.S.D. 83–88 (CR #071303) held that the country of origin of cardigan sweaters was Guam where there was an assembly of five imported parts (including front panels attached to the rear panel at the shoulders).

On the issue of the "Super Wash" chemical treatment performed in New Zealand, one commenter describes this shrink-proofing process as a chemical polymer treatment which changes the physical nature of the garment to make it machine-washable. The "Super Wash" process adds a polymer film to coat the wool fibers, thus achieving inter-fiber bonding or resin bridges which limit or eliminate movement of the fibers relative to each other. Apparently, the "Super Wash" label can only be used if the international standards set by the International Wool Secretariat for dimensional stability, felting resistance, and colorfastness are met.

Another commenter points out that "Super Washing" converts the sweater shapes into sized articles of clothing. During "Super Wash" the shapes shrink about 3 inches lengthwise, but are thereafter stabilized against further shrinkage. Thus, the parts produced in China are not sized into a finished garment until "Super Washed" in New Zealand.

Some commenters cite the case of *Dolliff & Company Inc.* v. *United States*, 81 Cust. Ct. 1, C.D. 4755 (1978), in which the court found that fabric exported to Canada was not merely altered, but transformed into a new and different article when the processing performed in Canada included heat-setting, chemical-scouring, dyeing, and treatment with finishing chemicals for anti-creasing and anti-static characteristics.

One commenter points out that if "Super Washing" *alone* does not effect a substantial transformation, then surely "Super Wash" combined with assembly operations in New Zealand results in a substantial transformation.

The claim is made that not only is New Zealand the "country of origin" of the subject sweaters for marking purposes, but also the

"country of exportation" for purposes of determining whether the sweaters are subject to the textile restraints imposed upon Chinese sweaters.

One commenter opposing the change of position states that country of origin determinations should be made independently of quota considerations and that the Commerce Department has no authority to interfere with Customs administration of Customs laws. Another commenter, in the same vein, states that country of origin determinations must be made under Customs laws as provided in the bilateral trade agreements. Still another commenter criticizes the Commerce Department for attempting to impose quota restraints upon New Zealand.

Finally, some commenters opposed to a change of position point out that Customs is required to reverse a practice only if such practice is "clearly wrong." Reference has been made to sections 177.9(d)(2) and 177.10(b), Customs Regulations (19 CFR 177.9(d)(2), 177.10(b)), regarding the publication of ruling revocations.

DECISION

First, it should be made clear that decisions of Customs, particularly rulings, are made after consideration of all relevant matters. Country of origin determinations in regard to marking and other areas are made on the facts of each case and what is deemed to be the applicable law. The quota status of merchandise is not a pertinent consideration. The views of the Department of Commerce concerning the correctness of a Customs ruling will be considered just as the views of any importer or manufacturer also would be considered.

Customs believes that the mere stitching together of two seams of an otherwise assembled sweater will not, by itself, cause a change in the country of origin of that garment. However, the problem is whether there has been a substantial transformation of the garment when the seam stitching is done in conjunction with other processing such as "Super Washing".

Whether a substantial transformation has occurred depends upon a comparison of the article *before* the processing which is claimed to effect such transformation and the article *after* the processing. Examination of the processing operations, and their relative costs and complexities, will also be considered. It is a well-settled principle of Customs law that, in order for a substantial transformation to be found, a new article having a new name, character, or use, must emerge from processing in a second country. *United States* v. *Gibson-Thomsen Co. Inc.*, 27 C.C.P.A. 267, C.A.D. 98 (1940).

The *Doliff* case, *supra,* is not applicable to the instant circumstances. The Court of Customs and Patent Appeals (*Doliff & Co.* v. *United States,* 66 CCPA 77, C.A.D. 225 (1979)), decided the case on the narrow issue of whether the finishing, including heat setting and dyeing, of greige fabric, constituted an "alteration" for pur-

poses of item 806.20, TSUS, not whether there was a substantial transformation for country of origin marking purposes.

Even if the CCPA decision in *Dolliff* could be extended beyond item 806.20, TSUS, that case does not go as far as *Joshua Hoyle & Sons* v. *United States,* 25 CCPA 128, T.D. 49244 (1937), which held that griege cloth which was mercerized and bleached became a new and different article having a new name, character, or use, because the processing transformed fabric which was commercially unsuitable for making shirts into shirting material.

United States v. *Murray, supra,* contains pertinent observations concerning country of origin criteria. There, the court defined the term "substantial transformation" as meaning a fundamental change in the form, nature, appearance, or character of an article which adds to the value of the article an amount or percentage which is significant in comparison with the value which the article had when exported from the country in which it was first manufactured, produced, or grown.

In regard to that definition, Customs does not believe that the sewing of two seams of a seater and subjecting that garment to a "Super Washing" process *fundamentally* changes the form, nature, appearance, or character of that garment. If, instead of being sent to New Zealand for finishing, the sweater was to be finished in the U.S., upon its importation it would be considered to be a substantially complete sweater, and classified as such. See General Headnote 10(h), TSUS. The processing of the garment in New Zealand has not changed the essence of the article. *Uniroyal Inc.* v. *United States, supra.* In this connection, *United States* v. *American Textile Engineering, Inc.,* 26 CCPA 48, T.D. 49597 (1938), involved a texturing-type processing of yarn, and, while the court recognized that the processing advanced the yarn in condition for use and to some extent changed its characteristics, the court held the merchandise did not have a new name, character, or use. The resultant product was still yarn.

Pursuant to the decisions in *Murray* and *Uniroyal,* the relative values and costs and the complexity of processing may be compared to aid in the determination of whether there has been a substantial transformation of the merchandise in a second country. Neither of those cases dealt with a situation such as presented here, where material from New Zealand is clearly transformed by a substantial manufacturing process into a product of China before being returned to New Zealand for further processing. What left China was plainly a product of that country. Therefore, it is logical to compare what left China with what was entered into the U.S. to determine if there has been sufficient further processing in New Zealand for the merchandise to cease being a Chinese product. Following the wording of *Murray,* it would appear that the initial costs and processing incurred in New Zealand *may* be attributable to China. However, in view of the fact that there was no fundamental change in the mer-

chandise in New Zealand prior to its export to the U.S., it is not necessary to resolve the allocation, if any, of the initial New Zealand costs and processing.

The decision in *Cardinal Glove, supra,* involved a completely different factual situation and is not considered controlling. That case involved the assembly of glove halves and was decided essentially on a country of exportation principle. Although making a finding of substantial transformation, at no time did the court discuss or review the legal principles involved with that principle.

It should also be noted that, contrary to an assertion that *Cardinal Glove* expressly approved of the result in C.S.D. 80–10, the court only cited the holding. The court expressed its full agreement with that portion of C.S.D. 80–10 which held that the manner of shipment from one country to a second country is not relevant to the determination of which country is the country of exportation.

After the receipt of comments requested on this matter, by T.D. 84–171, published in the Federal Register on August 3, 1984 (49 FR 31248), Customs issued interim regulations, which set out in § 12.130, Customs Regulations (19 CFR 12.130), criteria for country of origin determinations of textiles and textile products for quota, visa, and export license purposes. Numerous comments were received in response to the interim regulations. After consideration of the comments and further review of the matter, by T.D. 85–38, published in the *Federal Register* on March 5, 1985 (50 FR 8710), Customs adopted the interim regulations with certain modifications. Section 12.130, provides that where an article is the growth, product, or manufacture of two or more countries, it is a product of that country where it was substantially transformed by means of a substantial manufacturing or processing operation into a new and different article of commerce. Specific criteria are set forth to be considered in determining (1) whether there has been a substantial manufacturing or processing operation, and (2) whether, prior to importation into the U.S., an article or material usually will or will not be considered a product of a particular foreign territory or country, or insular possession of the U.S. Specifically stated not to constitute a substantial transformation are such processes as the mere joining together of otherwise completed component parts and "Super Washing". However, by performing both of these operations in one country, a substantial transformation is not automatically precluded.

Although § 12.130 was specifically promulgated for quota, visa, and export license purposes, the principles of origin contained therein were derived from recent judicial decisions (*e.g., Uniroyal* v. *United States*) and represent the law, as Customs understands it, to be applied in all country of origin decisions.

While, on their face, the new regulations may appear to be in conflict with *Cardinal Glove, supra,* and such administrative decisions as C.S.D. 80–10, Customs does not believe that this is the case. If the

court in *Cardinal Glove,* or if Customs in C.S.D. 80–10 and other rulings, had the information available which is now required by § 12.130, concerning costs and complexity of processing, etc., and had considered that information, as the court did in *Uniroyal,* the results could have been different.

Customs believes that when a comparison is made between the unfinished sweaters which went into New Zealand and the completed sweaters which were exported from New Zealand, the stitching and "Super Washing" in New Zealand actually amounted to a minor processing.

Accordingly, whether following the recent decisions in *Murray* or *Uniroyal* or the origin principles embodied in § 12.130, Customs believes that the sewing of two seams and the treating of a sweater so that it is washable does not fundamentally change a substantially complete sweater into a new and different article having a new name, character, or use. Therefore, this document revokes both CR #716351 and CR #719580 and any other existing Treasury or Customs decisions or administrative rulings, to the extent that they are inconsistent with the views contained herein.

In a related matter, by a document published in the *Federal Register* on August 2, 1985 (50 FR 31392), Customs proposed to change the established and uniform practices that are in conflict with the new criteria set forth in § 12.130. Because these changes of practice, if adopted, may result in higher rates of duty being assessed, the notice invited public comments on them before any change is made. After analysis of comments received in response to the notice proposing the changes of practice, another document will be prepared for publication in the Federal Register.

Drafting Information

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 134

Customs duties and inspection, imports, labeling, packaging and containers.

William von Raab,
Commissioner of Customs.

Approved: June 24, 1986.
Michael H. Lane,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, March 13, 1987 (52 FR 7825)]

(T.D. 87–30)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
February 2, 1987	$.007516
February 3, 1987	.007605
February 4, 1987	.007505
Febraury 5, 1987	.007440
February 6, 1987	.007380
Israel shekel:	
February 2–6, 1987	N/A
South Korea won:	
February 2, 1987	.001161
February 3, 1987	.001162
February 4, 1987	.001163
February 5–6, 1987	.001162
Taiwan N.T. dollar:	
February 2, 1987	N/A
February 3, 1987	.028482
February 4, 1987	.028490
February 5, 1987	.028506
February 6, 1987	.028514

(LIQ–03–01 S:COM CIE)

Dated: February 6, 1987.

Angela DeGaetano,
Chief,
Customs Information Exchange.

(T.D. 87–31)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates,

are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma	
February 9, 1987	$.007485
February 10, 1987	.007536
February 11, 1987	.007496
February 12, 1987	.007493
February 13, 1987	.007446
Israel shekel:	
February 9–13, 1987	N/A
South Korea won:	
February 9, 1987	.001161
February 10, 1987	.001162
February 11, 1987	.001163
February 12–13, 1987	.001162
Taiwan N.T. dollar:	
February 9, 1987	.028523
February 10, 1987	N/A
February 11, 1987	.028539
February 12, 1987	.028547
February 13, 1987	.028547

(LIQ–03–01 S:COM CIE)

Dated: February 13, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–32)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

February 16, 1987 holiday.

Greece drachma:	
February 17, 1987	$.007496
February 18, 1987	.007429
February 19, 1987	.007372
February 20, 1987	.007463
Israel shekel:	
February 16–20, 1987	N/A
South Korea won:	
February 17–19, 1987	.001163
February 20, 1987	.001162
Taiwan N.T. dollar:	
February 17–18, 1987	.028555
February 19, 1987	.028539
February 20, 1987	.028523

(LIQ–03–01 S:COM CIE)

Dated: February 20, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–33)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to 31 USC 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
February 23, 1987	$.007435
February 24, 1987	.007421
February 25, 1987	.007457
February 26, 1987	.007502
February 27, 1987	.007443
Israel shekel:	
February 23–27, 1987	N/A

South Korea won:	
February 23, 1987	.001163
February 24, 1987	.001163
February 25, 1987	.001163
February 26, 1987	.001164
February 27, 1987	.001165
Taiwan N.T. dollar:	
February 23, 1987	.028555
February 24, 1987	.028547
February 25, 1987	.028523
February 26, 1987	.028506
February 27, 1987	.028523

(LIQ-03-01 S:COM CIE)

Dated: February 27, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87-34)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87-3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
February 2, 1987	$.078524
February 3, 1987	.078864
February 4, 1987	.078431
Belgium franc:	
February 2, 1987	.026709
February 3, 1987	.026774
February 4, 1987	.026617

Brazil cruzado:	
February 2, 1987	.060470
February 3, 1987	.060125
February 4, 1987	.059214
February 5, 1987	.059214
February 6, 1987	.058761
Denmark krone:	
February 2, 1987	.145985
February 3, 1987	.146520
February 4, 1987	.145815
France franc:	
February 2, 1987	.165893
February 3, 1987	.166528
Germany deutsche mark:	
February 2, 1987	.553403
February 3, 1987	.556019
February 4, 1987	.551268
Netherlands guilder:	
February 2, 1987	.490316
February 3, 1987	.493218
February 4, 1987	.488639
Norway krone:	
February 3, 1987	.143781
February 4, 1987	.143369
Switzerland franc:	
February 2, 1987	.655523
February 3, 1987	.658762
February 4, 1987	.652529

(LIQ–03–01 S:COM CIE)

Dated: February 6, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–35)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87–3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is neces-

sary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
February 9, 1987	$.078278
February 10, 1987	.078989
February 11, 1987	.078309
February 12, 1987	.077791
Belgium franc:	
February 9, 1987	.026560
February 10, 1987	.026838
February 11, 1987	.026583
February 12, 1987	.026455
February 13, 1987	.026392
Brazil cruzado:	
February 9, 1987	.057840
February 10, 1987	.057840
February 11, 1987	.057290
February 12, 1987	.056148
February 13, 1987	.055602
Denmark krone:	
February 9, 1987	.145359
February 10, 1987	.147059
February 11, 1987	.145730
February 12, 1987	.144844
February 13, 1987	.144802
Finland markka:	
February 10, 1987	.222099
France franc:	
February 10, 1987	.166945
Germany deutsche mark:	
February 9, 1987	.550206
February 10, 1987	.556174
February 11, 1987	.550267
February 12, 1987	.547945
Netherlands guilder:	
February 9, 1987	.487567
February 10, 1987	.492732
February 11, 1987	.487805
February 12, 1987	.485673
Norway krone:	
February 10, 1987	.143781
Switzerland franc:	
February 9, 1987	.652529
February 10, 1987	.658762

(LIQ–03–01 S:COM CIE)

Dated: February 13, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–36)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87–3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
February 17, 1987	$.078339
February 18, 1987	.077821
Belgium franc:	
February 17, 1987	.026603
February 18, 1987	.026385
February 20, 1987	.026385
Brazil cruzado:	
February 17, 1987	.054487
February 18, 1987	.053940
February 19, 1987	.053396
February 20, 1987	.053396
Denmark krone:	
February 17, 1987	.145953
February 18, 1987	.144928
February 20, 1987	.144802
France franc:	
February 17, 1987	.165412
Germany deutsche mark:	
February 17, 1987	.551116
Netherlands guilder:	
February 17, 1987	.488043
Norway krone:	
February 17, 1987	.143266
February 18, 1987	.143164

(LIQ-03-01 S:COM CIE)

Dated: February 20, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87-37)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87-3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
February 26, 1987	$.077942
February 27, 1987	.077821
Belgium franc:	
February 23, 1987	.026364
February 24, 1987	.026316
February 25, 1987	.026399
February 26, 1987	.026455
February 27, 1987	.026420
Brazil cruzado:	
February 23, 1987	.052323
February 24, 1987	.051795
February 25, 1987	.051272
February 26, 1987	.050818
February 27, 1987	.050518
Denmark krone:	
February 23, 1987	.144718
February 25, 1987	.144980
February 26, 1987	.145349
February 27, 1987	.145075
Germany deutsche mark:	
February 26, 1987	.548546
Netherlands guilder:	
February 26, 1987	.485437

New Zealand dollar:	
February 24, 1987	.55300
February 25, 1987	.55450
February 26, 1987	.55820
February 27, 1987	.56050
Norway krone:	
February 23, 1987	.143062

(LIQ–03–01 S:COM CIE)

Dated: February 23, 1987.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 192

PROPOSED CUSTOMS REGULATIONS AMENDMENTS CONCERNING EXPORTATION OF USED SELF-PROPELLED VEHICLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposed to amend the Customs Regulations by adding a new part concerning the exportation of used self-propelled vehicles. It sets forth the requirements for lawful exportation of such vehicles as well as the penalties and liabilities for attempted unlawful exportation. These regulations are necessary to implement certain provisions of the Motor Vehicle Theft Law Enforcement Act of 1984 and the Trade and Tariff Act of 1984 dealing with the unlawful exportation of used self-propelled vehicles.

DATE: Comments must be received on or before May 18, 1987.

ADDRESS: Written comments (preferably in triplicate) may be addressed to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229. Comments relating to the information collection aspects of the proposal should be addressed to Customs, as noted above, and also to the Office of Information and Regulatory Affairs, Attention: Desk Officer for U.S. Customs Service, Office of Management and Budget, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Harriett D. Blank, 202–566–5746 or Operational Aspects: Louis Razzino, 202–566–2140.

SUPPLEMENTARY INFORMATION:

Background

The Motor Vehicle Theft Law Enforcement Act of 1984 (Pub. L. 98–547) amended the Tariff Act of 1930, as amended (19 U.S.C. 1202 *et seq.*), by adding a new § 627 (19 U.S.C. 1627), relating to the un-

lawful importation or exportation of certain vehicles and equipment. Subsequently, the Tariff Act of 1930 was further amended by § 205 of the Trade and Tariff Act of 1984 (Pub. L. 98–573), which also added a new § 627 similar to § 627 of Pub. L. 98–547. The amendments made by Pub. L. 98–573 are set forth as 19 U.S.C. 1627a.

The new sections provide for civil penalties of not more than $10,000 for each violation, for knowingly importing, exporting, or attempting to import or export (1) any stolen self-propelled vehicle, vessel, aircraft or part of a self-propelled vehicle, vessel, or aircraft; or (2) any self-propelled vehicle or part of a self-propelled vehicle from which the vehicle identification number (VIN) has been removed, obliterated, tampered with, or altered. Also, any violation of 19 U.S.C. 1627 or 1627a subjects the vehicle, vessel, aircraft, or part thereof to seizure and forfeiture. In addition, any person attempting to export a used self-propelled vehicle must present both the vehicle and a document describing the vehicle, which includes the VIN, to Customs before lading if the vehicle is to be transported by vessel or aircraft, or before exportation if the vehicle is to be transported by rail, highway, or under its own power. Failure to comply with this provision subjects the violator to a civil penalty of $500 for each violation.

Pub. L. 98–547 and Pub. L. 98–573 were enacted in response to the ever-increasing incidents of the theft of motor vehicles and other conveyances and their exportation from the U.S. It is estimated that approximately 200,000 stolen vehicles are exported each year, primarily by professional thieves or people employed by them to effect the exportation. The recovery rate for stolen vehicles decreased from 86% in 1967 to 62.9% in 1984.

There is also a growing problem concerning the exportation of vehicle components. The parts are often shipped in sealed containers, making detection more difficult.

The legislation concerning the exporting and importing of self-propelled vehicles, other conveyances or parts thereof with altered vehicle identification numbers established penalties for violations and provided for the seizure and forfeiture of the vehicle, other conveyance or the parts. It is expected that these sanctions will both deter the exportation of stolen vehicles and improve the recovery rate of those vehicles which are stolen. The legislation also directed that regulations be prescribed by the Secretary of the Treasury with regard to the procedures for the lawful exportation of used self-propelled vehicles.

Proposed Action

The existing Customs Regulations (19 CFR Chapter I) contain no provisions dealing exclusively with the exportation of vehicles. To implement 19 U.S.C. 1627 and 1627a, it is proposed to establish a new Part 192, Customs Regulations (19 CFR Part 192). Sections 192.1 through 192.4 of Subpart A of Part 192 would set forth the

procedures for the lawful exportation of used self-propelled vehicles. They would require a person attempting to export such a vehicle to furnish documentation, to include the vehicle identification number, sufficient to prove to Customs that the vehicle is lawfully owned by the exporter. Section 192.1 would define "self-propelled vehicle", "used", "ultimate purchaser", and "export", the terms used in Pub. L. 98–573 and the new regulations, so that they would be properly interpreted. Failure to comply with the requirements of the new regulations would result in a penalty of $500 for each violation. Also, exportation of the vehicle would only be permitted upon compliance with these regulations. Further, § 192.4 would reference the liabilities of carriers under title 46, United States Code, section 91, for inaccurately describing used self-propelled vehicles on the manifest or failing to include the vehicles on the manifest.

As proof of ownership of the vehicle by the exporter, Customs would accept an original certificate of title, or a memorandum of ownership, or a right of possession, or any other document sufficient to prove lawful ownership, such as a bill of sale or a sales invoice. In lieu of an original document, Customs would accept a certified copy.

The exporter must also present 2 facsimiles of the original document or certified copy. Customs would authenticate both facsimile documents, one of which would remain in the possession of the exporter, and the other of which will be collected by Customs for forwarding to the National Automobile Theft Bureau (NATB) on the same day. Customs would not retain the documentation relating to the exportation. The NATB would enter the VIN and other information on the exported vehicles into their data base for recordkeeping purposes.

The authentication by Customs would include the stamping of the facsimile documents with the date of their presentation. As to exportations at a land border, where the vehicle is to be transported by rail, highway, or under its own power, this date will most likely be the date of exportation. At sea borders, where the vehicle is to be transported by vessel, or at airports, where the vehicle is to be transported by aircraft, the date of presentation of the facsimile documents will often precede the actual date of exportation.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

PAPERWORK REDUCTION ACT

This document is subject to the Paperwork Reduction Act. Accordingly, a copy has been submitted to the Office of Management and Budget for review and comment pursuant to 44 U.S.C. 3504(h). Public comments relating to the information collection aspects of the proposal should be addressed to Customs and to the Office of Management and Budget at the address set forth in the ADDRESS portion of this document.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR CHAPTER I

Customs duties and inspection, Imports, Exports.

PROPOSED AMENDMENTS

It is proposed to amend Chapter I of Title 19, Code of Federal Regulations (19 CFR Chapter I), by adding a new Part 192, to read as follows:

PART 192—EXPORT CONTROL

Section

Authority: 19 U.S.C. 66, 1624, 1627, 1627a, 1646a

§ 192.0 Scope.

This part sets forth regulations pertaining to procedures for the lawful exportation of used self-propelled vehicles and the penalties and liabilities incurred for failure to comply with any of the procedures. This part also sets forth regulations concerning controls exercised by Customs with respect to the exportation of certain merchandise.

§ 192.1 Definitions.

The following are general definitions for the purposes of Subpart A:

(a) *Self-propelled vehicle.* "Self-propelled vehicle" includes any automobile, truck, tractor, bus, motorcycle, motor home, self-propelled agricultural machinery, self-propelled construction equipment, self-propelled special use equipment, and any other self-propelled vehicle used or designed for running on land but not on rail.

(b) *Used.* "Used" refers to any self-propelled vehicle the equitable or legal title to which has been transferred by a manufacturer, distributor, or dealer to an ultimate purchaser.

(c) *Ultimate purchaser.* "Ultimate purchaser" means the first person, other than a dealer purchasing in his capacity as a dealer, who in good faith purchases a self-propelled vehicle for purposes other than resale.

(d) *Export.* "Export" refers to the transportation of merchandise out of the U.S. for the purpose of being entered into the commerce of a foreign country.

§ 192.2 Requirements for exportation.

(a) *Basic requirements.* A person attempting to export a used self-propelled vehicle shall present to Customs both the vehicle and a document describing the vehicle, which includes the vehicle identification number (VIN). The person attempting to export the vehicle may employ an agent for the exportation of the vehicle.

(b) *Documentation required.* An original certificate of title, memorandum of ownership, or right of possession, or any other document sufficient to prove lawful ownership, such as a bill of sale or a sales invoice, or a certified copy of any of these documents, as well as 2 facsimiles of the original or certified copy, shall be presented.

(c) *When presented.* If the vehicle is to be transported by vessel or aircraft, the documentation must be presented before lading. If the vehicle is to be transported by rail, highway, or under its own power, the documentation is to be presented before exportation of the vehicle.

(d) *Authentication of documentation.* Customs shall authenticate both facsimile documents, one of which shall remain in the possession of the exporter and one of which shall be collected by Customs. Authentication will include the stamping of the facsimile documents with the date of presentation of the documents. The authen-

ticated facsimile document will be the only acceptable evidence from the exporter of compliance with the requirements of this section.

§ 192.3 Penalties.

A penalty in the amount of $500 against the exporter for each vehicle attempted to be exported will be assessed for failure to comply with these requirements. Also, exportation of a vehicle will be permitted only upon compliance with these requirements.

§ 192.4 Liability of carriers.

Under the provisions of 46 U.S.C. 91, the vessel master is charged with the responsibility of presenting a true manifest. If used vehicles are not included on the manifest or are inaccurately described thereon, a liability of not more than $1,000 nor less than $500 will be incurred.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: December 15, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 17, 1987 (52 FR 8308)]

U.S. Court of Appeals for the Federal Circuit

March 2, 1987.

ERRATUM

(Appeal No. 86–1201)

ICC INDUSTRIES, INC., ICD GROUP, INC., APPELLANTS *v.* UNITED STATES, APPELLEE

(Decided February 11, 1987)

Please make the following corrections to Appeal No. 85–2806, published in CUSTOMS BULLETIN, Vol. 21, No. 9, dated March 4, 1987:
Page 17, line 16, change section cite to read: "1673d(b)(1)(A)(i)".

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 87–16)

EAST CHILLIWACK FRUIT GROWERS CO-OPERATIVE, PLAINTIFF *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND MALCOLM BALDRIDGE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, DEFENDANTS, AND WASHINGTON RED RASPBERRY COMMISSION, RED RASPBERRY COMMITTEE OF THE OREGON CANEBERRY COMMISSION, RED RASPBERRY COMMITTEE OF THE NORTHWEST FOOD PROCESSORS ASSOCIATION, RED RASPBERRY MEMBER GROUP OF THE AMERICAN FROZEN FOOD INSTITUTE, WASHINGTON RED RASPBERRY GROWERS ASSOCIATION, NORTH WILLAMETTE HORTICULTURAL SOCIETY, RADAR FARMS, RON ROBERTS, AND SHUKSAN FROZEN FOODS, INC., INTERVENOR-DEFENDANTS

Court No. 85–07–00978

OPINION AND ORDER

[Plaintiff's motion for judgment on agency record granted in part and denied in part; plaintiff's motion to strike intervenor-defendants' cross-claim granted; intervenor-defendants' motion for leave to file amended answer denied; plaintiff's application for preliminary injunction denied; action remanded to International Trade Administration.]

(Decided February 13, 1987)

Bogle & Gates (Joel R. Junker, Christopher N. Weiss, and *Peter L. Miller)* for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(J. Kevin Horgan);* and Office of Assistant General Counsel for Import Administration, U.S. Department of Commerce *(Eileen P. Shannon)* for the defendants.

Kilpatrick & Cody (Joseph W. Dorn and *Anthony H. Anikeeff)* for the intervenor-defendants.

AQUILINO, *Judge:* As a result of its final determination of sales at less than fair value in *Red Raspberries from Canada,* 50 Fed. Reg. 19,768 (May 10, 1985), the International Trade Administration, U.S. Department of Commerce ("ITA") directed the Customs Service to continue to suspend liquidation of involved entries of raspberries by the plaintiff cooperative, which is an association of growers of fruits and vegetables in British Columbia who agree to deliver their

produce to it for processing or packing and marketing. A cash deposit equal to an estimated weighted-average dumping margin of 3.39 percent was required.

The plaintiff has moved pursuant to CIT Rule 56.1 for judgment upon the agency record, alleging that (a) the ITA failed to convert plaintiff's foreign market value from Canadian into U.S. dollar terms prior to comparing the cooperative's foreign market value to its United States sales prices; (b) the ITA improperly decided to construct a foreign market value for the plaintiff based on the agency's erroneous comparison of home market sales prices, which excluded packing costs, to cost of production figures, which included packing costs; (c) the ITA improperly imputed finance costs to the plaintiff without regard to the fact that it held its inventory for its juice and processing operations and not for bulk packing; and (d) the ITA improperly refused to disclose to the plaintiff and make part of the record agency recalculations made subsequent to the ITA's final determination.

In response, the defendants "concede that certain mathematical errors were committed in the process of calculating antidumping duty rates in the final determination"[1] and that "remand of this determination * * * is the only way of assuring an accurate, efficient, economical and lawful redetermination of the antidumping duty margin." Defendants' Memorandum, p. 22. Further:

> To the best of the Department [of Commerce]'s knowledge at this time, the Department committed the specific computational errors which plaintiff has alleged, *i.e.*, the misapplication of the exchange rate to East Chilliwack's constructed value, and the comparison of the company's home market sales from which packing costs had been deducted to a cost of production which included packing costs. However, the Department does not concede that corrections of these and other errors will lead to the results which plaintiff has alleged: specifically, that all of East Chilliwack's sales to the United States would be found to be above foreign market value, and that constructed value would not be used as a basis of the company's foreign market value. The Department is unable to speculate upon the actual results of the correction of mathematical errors until such corrections have been carried out upon remand of this determination. *Id.* at 23.

I

Of the two disputed questions remaining, the one claiming unlawful failure to disclose ITA revised calculations predates the present motion. That is, after the parties' pleadings had joined issue on the matter, the plaintiff interposed a motion to complete the administrative record "by including in the record all revised calculations relied upon by the ITA * * *, including revised calculations emanat-

[1] Memorandum of Points and Authorities in Support of Defendants' Partial Opposition to Plaintiff's Motion for Judgment Upon the Agency Record [hereinafter cited as "Defendants' Memorandum"], p. 22.

ing from calculation errors discovered on June 26, 1985", to quote from the order proposed by plaintiff's counsel. The defendants opposed the motion, essentially on the ground that the revised calculations, "even if they do exist"[2], could not have been, and were not, presented to or obtained by the ITA during the course of the administrative proceeding within the meaning of 19 U.S.C. § 1516a(b)(2)(A)(i). After due deliberation, this court denied plaintiff's motion.

In their papers in support of plaintiff's motion for judgment on the record, counsel take issue with the court's decision, relying now on *Blaw Knox Construction Equipment Co.* v. *United States*, 8 CIT 210, 596 F.Supp. 476 (1984). That case, however, stands simply for the proposition that the ITA has the authority to issue corrected instructions to Customs regarding cash deposit requirements in conjunction with the agency's annual review pursuant to 19 U.S.C. § 1675 of a final determination of dumping.[3]

The defendants choose to rest on the May 1985 final determination and the record compiled by the ITA beforehand. That is, whatever second guesses may have been made thereafter have not resulted, to the court's knowledge, in any modification of that determination. Furthermore, in compliance with CIT Rule 71(a)(3), the ITA has submitted a certification of completeness of the record filed with the court.

Only in rare or exceptional cases will litigants in plaintiff's position be permitted to go beyond such a certification. *See, e.g., National Corn Growers Association* v. *Baker*, 9 CIT ——, Slip Op. 85–109 (Oct. 9, 1985). *See also National Corn Growers Association* v. *Baker*, 10 CIT ——, 636 F.Supp. 921, 927–30 (1986).

The plaintiff makes no showing that the facts and circumstances of this action entitle it to the extraordinary relief requested.

II

The other disputed substantive issue centers on the ITA's use of constructed value to determine the foreign market value of the merchandise investigated, namely, "fresh and frozen red raspberries packed in bulk containers and suitable for further processing"[4], for the period July 1, 1983 to June 30, 1984, in particular, the agency's computation of "general expenses" within the meaning of 19 U.S.C. § 1677b(e)(1)(B) and 19 C.F.R. § 353.6(a)(2) for the plaintiff to include "inventory carrying charges".

The position of the cooperative before the ITA and now this court is that, while it had been a bulk packer of raspberries, in 1981 it embarked on a program to develop new berry juice and concentrate products. Delay in the start-up of a new juice plant, however, result-

[2] Defendants' Opposition to Plaintiff's Motion to Complete Administrative Record, p. 1. Footnote 2 on page 4 of that document states that the "Commerce Department has been unable to locate the 'revised calculations' which plaintiff alleges were performed by ITA personnel."

[3] This court notes in passing that the change merely entailed posting of deposits to cover only those sales determined to constitute dumping and not those fair-value sales originally subject to a weighted-average margin engendered exclusively by the former.

[4] 50 Fed. Reg. at 19,768.

ed in a significant inventory carryover and an "inability of the developing juice and concentrate market to absorb the amount of processed product which would have been expected if the product had been on the market when originally scheduled."[5] Moreover, there was a bumper crop of raspberries in 1983, which added to the cooperative's stockpile and led it to market some of that inventory in the manner which came under investigation by the ITA. The plaintiff argues from these facts that the ITA wrongfully imputed

> finance (carrying) costs for inventory and receivables for raspberry inventory intended for East Chilliwack's juice and concentrate operations. However, for the purpose of the product under investigation—bulk-packed raspberries—East Chilliwack's finance costs, if any, should be only those that would have been incurred by East Chilliwack in the normal course of making bulk sales as if East Chilliwack were a bulk packer. If East Chilliwack had been a bulk packer, it would have had no need to hold its inventory as long as it did for its juice and concentrate operations.[6]

Counsel refine this argument further in their reply brief by contending that plaintiff's costs need not be comparable to those of the other bulk-packers, only that the costs be segregated from costs not incurred for the export activity at issue.

Defendants' response is fourfold: First, the cooperative actually experienced finance expenses as a result of holding raspberries from the preceding year in inventory, and the ITA therefore did allocate a portion thereof to the subject merchandise. Secondly, the expense was related to the bulk-packed raspberries, not other product lines, regardless of whether or not that fruit was originally destined for another process. Third, the berries in question were sold in the "ordinary course of trade" within the meaning of 19 U.S.C. §§ 1677(15) and 1677b(e)(1)(B). And finally, the fact that the cooperative's operations were aimed primarily at processing juice and concentrate did not render its sales of bulk-packed fruit outside the ordinary course of trade, especially when those sales proved to be a major part of the trade. *See generally* Defendants' Memorandum, pp. 10–22.

After consideration of the foregoing competing arguments and comparing them with the record, this court is unable either to conclude that the final determination is not in accordance with law on this issue or to find that the approach taken by the ITA is unsupported by substantial evidence.

The law is that, when constructed value is employed to determine foreign market value of merchandise in accordance with 19 U.S.C. § 1677b, that value shall include an

---

[5] Confidential Document 26 (Processing Costs of Production, East Chilliwack Fruit Growners' Co-operative Revised Submission, p. 1 (Feb. 8, 1985)).

[6] Memorandum of East Chilliwack Fruit Growers Co-Operative in Support of Plaintiff's Motion for Judgment Upon the Agency Record, p. 23.

> amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration * * *.[7]

One such general expense is the cost of financing. The plaintiff does not dispute that this is the governing rule. Rather, the "high finance charges to uncharacteristic export sales at the end of the 1983–84 season should be adjusted to reflect ordinary course of trade practices." Plaintiff's Reply Memorandum, p. 5.

General expenses, as the term indicates, are incurred in the overall operation of an enterprise and therefore are normally allocable across the full range of its business. However, the defendants will apparently link finance costs to a particular product when they are able to attribute those costs specifically to that product. *See, e.g., Titanium Sponge from Japan,* 49 Fed. Reg. 38,687, 38,689 (Oct. 1, 1984). But, the ITA's investigation of the cooperative herein determined that its cost-accounting system did not accumulate general expenses by product. *See, e.g.,* RecDoc 92 at 8.

This fact has led plaintiff's counsel to argue as quoted above, page 7, to wit, that its finance costs "should be only those that would have been incurred by East Chilliwack in the normal course of making bulk sales as if East Chilliwack were a bulk packer." This contention, however, cannot and does not blur the facts evidenced in the record (1) that the plaintiff did export to the United States the merchandise under investigation and (2) that it did incur finance costs in carrying those raspberries prior to export in inventory, whatever the original intent for doing so may have been. That is, the merchandise was sold in the ordinary course of the raspberry business by the plaintiff. Defendants' Memorandum states (at page 20):

> When the Department examines whether sales are in the ordinary course of trade, it looks to whether those sales are made under conditions that are normal for the *product* that is being sold. Whether or not the *seller* ordinarily sells the subject product is irrelevant. [emphasis in original]

The court concludes that this approach is reasonable and in accordance with law. Moreover, from the evidence at hand, the court does not find that plaintiff's activities were out of the ordinary.

III

In challenging the ITA's nonallocation of finance costs, the plaintiff referred with approval in its memorandum (at page 22) to the agency's allocation of the costs of storing the raspberries in question. The intervenor-defendants responded to this reference with a claim that the ITA's calculation of those storage costs was erroneous. Their brief in opposition to plaintiff's motion for judgment on

[7] 19 U.S.C. § 1677b(e)(1)(B); 19 C.F.R. § 353.6(a)(2).

the record requests that the court reverse and remand the storage-cost calculations.

This reaction has engendered a motion by the plaintiff to "strike intervenor's cross-claim regarding storage costs" which is joined in by the defendants. The intervenor-defendants have countered with a motion for leave to file an amended answer to plaintiff's amended complaint.[8] Their original answer, which was filed months after commencement of this action along with their motion for leave to intervene as parties defendant, denied the averments of the complaint (repeated verbatim in the amended complaint) contesting the ITA's calculation of storage costs.[9] As pointed out above, those costs are not now challenged in plaintiff's motion for judgment, allegedly as a result of counsel's review of the record.[10]

The foregoing papers, some presented prior to, others after, the court's hearing all sides on the merits, leave little doubt that the intervenor-defendants seek to assert a cross-claim. CIT Rule 15(b) permits amendments to conform to the evidence, but this rule applies essentially to evidence that is adduced during a trial in this Court of International Trade and not to evidence adduced in another proceeding. Indeed, as indicated in point I *supra*, the court's review of an action such as this is restricted to the administrative record as described in 19 U.S.C. § 1516a(b) (2).

In *Nakajima All Co., Ltd.* v. *United States,* 2 CIT 170 (1981), the court held that an intervening party cannot contest an antidumping-duty order through a cross-claim which does not comport with the time limitations imposed by 19 U.S.C. § 1516a(a). *See also Fuji Electric Co., Ltd.* v. *United States,* 7 CIT 247, 595 F.Supp. 1152 (1984).

In *Nakajima*, as here, the cross-claims were sought to be interposed months after commencement of the actions. Moreover, the intervenor-defendants herein were the petitioners before the ITA who themselves brought timely actions to contest the same final agency determination *sub nom. Washington Red Raspberry Commission* v. *United States,* CIT Nos. 85–06–00789 and 85–06–00865. Of course, neither of those complaints contain the claim raised now, and intervenor-defendants' able counsel have offered reasons for their belated position, but they do not surmount the strict standards governing the Court of International Trade's jurisdiction of an action such as this. As the court stated in *Georgetown Steel Corporation* v. *United States,* 801 F.2d 1308, 1312 (Fed. Cir. 1986):

> Since section 1516a(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immuni-

[8] The court had granted an unopposed motion by the plaintiff to amend its complaint to include its fourth alleged cause of action.

[9] Intervenor-defendants' proposed amended answer would modify their outright denial of the allegations of paragraph 24 of the complaint "except to admit that the ITA did not calculate East Chilliwack's costs of storage so as to reflect all such costs for sales in the normal course of commerce." Their proposed amendments also entail concomitant modification of their denial of paragraph 25 and assertion of a specific claim for relief against the defendants for their alleged erroneous computation of the costs now questioned.

[10] *See* Memorandum of East Chilliwack Fruit Growers Co-Operative in Support of Motion to Strike Intervenor's Cross-Claim Regarding Storage Costs, p. 2.

> ty in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions * * *. If a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no "jurisdiction to entertain the suit." [citations omitted]

IV

The plaintiff has now presented the court with an application for a preliminary injunction based upon a realization that the defendants carried out an annual review pursuant to 19 U.S.C. § 1675 of the antidumping-duty order challenged herein and that the review led to a direction to Customs to liquidate plaintiff's entries at the deposit rate. Apparently, the Service carried out its instructions.

Plaintiff's application states that it chose not to attempt to participate in the annual review because (1) it was anticipated that the court's above decision in points I and II "would have been rendered before completion of the annaul review and the liquidation of any entries from that review" and (2) "the dumping rate applied to East Chilliwack in the preliminary affirmative determination is sufficiently low that contesting it by way of review would not be justified economically by full participation in the review process". Affidavit of Joel R. Junker, Esq., para. 5. The defendants respond in sum and substance that the application is too late for the relief requested to have any impact on the Customs liquidations. The court concurs.

In *Bomont Industries* v. *United States*, CIT ——, 638 F.Supp. 1334 (1986), this court overruled a government contention that an injunction suspending liquidation would be "meaningless", albeit in an action challenging a final negative ITA determination of sales at less than fair value. The decision, however, was based upon the plain meaning of 19 U.S.C. § 1516a(c) and (e), which also apply to annual reviews pursuant to section 1675. *See* 19 U.S.C. § 1516a(2)(B)(iii). In *Zenith Radio Corporation* v. *United States*, 710 F.2d 806, 810 (Fed. Cir. 1983), the court concluded that the consequences of liquidation in a situation such as this "do constitute irreparable harm." The proper method to forestall those consequences is timely application for an injunction.

When a party moves in time, this court can provide effective relief in appropriate cases. *See, e.g., Nakajima All Co., Ltd.* v. *United States*, Court No. 87–01–00089 (preliminary injunction granted Feb. 5 1987); *Smith Corona Corporation* v. *United States*, Court No. 87–02–00157 (temporary restraining order entered Feb. 6, 1987); *Krupp Stahl A.G.* v. *United States*, Court No. 87–02–00199 (preliminary injunction granted Feb. 12, 1987).

Plaintiff's application herein reflects a lost opportunity. But even if it had been made early enough, the court is required to consider all four traditional criteria for grant of extraordinary equitable relief, not just irreparable harm. *See, e.g., Stile Associates Ltd.* v. *Sny-*

der, 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d. 522, 525 (1981). One of those other requirements, of course, is a showing of likelihood of success on the merits. While the court does not express any view on the ultimate effect of the points conceded by the defendants, this opinion shows that the plaintiff has failed to carry its burden on the issues contested by them.

* * * * * * *

Now, therefore, in view of the foregoing, it is

ORDERED that plaintiff's motion pursuant to CIT Rule 56.1 for judgment upon the agency record be, and it hereby is, granted in part and denied in part in accordance with the above opinion; and it is further

ORDERED that this matter be, and it hereby is, remanded to the International Trade Administration, U.S. Department of Commerce for reconsideration of the issues raised by the plaintiff in parts (a) and (b) of its aforesaid motion; and it is further hereby

ORDERED that the defendants file any determination of the issues remanded within 45 days hereof, that the plaintiff have 15 days thereafter in which to respond and that the defendants have ten days to reply thereto; and it is further

ORDERED that plaintiff's motion to strike intervenor-defendants' cross-claim regarding storage costs be, and it hereby is, granted; and it is further

ORDERED that intervenor-defendants' motion for leave to file a first amended answer be, and it hereby is, denied; and it is further

ORDERED that plaintiff's application for a preliminary injunction be, and it hereby is, denied.

(Slip Op. 87–17)

UST, INC., AND TSUBAKIMOTO CHAIN CO., PLAINTIFFS *v.* UNITED STATES; MALCOLM BALDRIDGE, SECRETARY OF COMMERCE; BRUCE S. SMART, JR., UNDER SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE; PAUL FREEDENBERG, ACTING ASSISTANT SECRETARY OF COMMERCE FOR TRADE ADMINISTRATION; GILBERT L. KAPLAN, DEPUTY ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION; LEONARD M. SHAMBON, DIRECTOR, OFFICE OF COMPLIANCE, DEFENDANTS, AMERICAN CHAIN ASSOCIATION, DEFENDANT-INTERVENOR

Court No. 86–08–00993

Before CARMAN, *Judge*.

[Plaintiff's motion for injunction pending appeal denied.]

(Decided February 20, 1987)

Barnes, Richardson and Colburn (Robert E. Burke and *David A. Riggle* on the motion) for the plaintiffs.

Richard K. Willard, Assistant Attorney General *(Velta Melnbrencis* on the motion) for the defendants.

Covington and Burling (Douglas E. Phillips and *David E. McGiffert* on the motion) for the defendant-intervenor.

MEMORANDUM OPINION

CARMAN, *Judge:* Plaintiffs have filed a motion for an injunction pending appeal of *UST, Inc.*, v. *United States*, —— CIT ——, Slip Op. 86–100 (Oct. 10, 1986). The motion seeks to enjoin the Department of Commerce from "conducting an administrative review of plaintiffs pursuant to 19 U.S.C. 1675 of roller chain, other than bicycle, from Japan for the period April 1, 1985 through March 31, 1986." Plaintiffs' proposed order enjoins the Secretary of Commerce "until a final decision is reached on the appeal of Slip Op. 86–100" from (1) "conducting any § 751 administrative reviews of the plaintiffs, pursuant to 19 U.S.C. § 1675 for the antidumping finding on Roller Chain, other than bicycle from Japan for the April 1, 1985 through March 31, 1986 period", and (2) "requiring a response to any questionnaires, conducting any verifications or pursuing, in any manner, any § 751 administrative review of plaintiffs, pursuant to 19 U.S.C. § 1675 for the antidumping finding on Roller Chain, other than bicycle, from Japan for the April 1, 1985 through March 31, 1868 period * * *."

This Court has denied plaintiffs' motion and directed plaintiffs to respond to the Department of Commerce's antidumping questionnaires for the period April 1, 1985 through March 31, 1986 within 20 days of the date of filing of the order with the Clerk of this Court on February 10, 1987. This Slip Opinion constitutes the grounds for these actions pursuant to Rule 52(a) fo the rules of this Court.

BACKGROUND

On October 10, 1986, this Court issued an order and its memorandum opinion, *UST, Inc.* v. *United States*, —— CIT ——, Slip Op. 86–100 (October 10, 1986), in this case. In that order, as corrected by the order of November 25, 1986, this Court: (1) denied plaintiffs' application for a temporary restraining order, preliminary injunction and immediate issuance of liquidation instructions; (2) continued plaintiffs' application for a writ of mandamus until August 10, 1987; (3) ordered plaintiffs to respond to the Commerce Department's questionnaire for the period April 1, 1985 through March 31, 1986 by November 18, 1986; (4) ordered the Commerce Department to complete the review and publish: (a) the final results for the period December 1, 1979 through March 31, 1981 by November 28, 1986; (b) the preliminary results for the period April 1, 1981 through August 31, 1983 by November 28, 1986, and the final results for that period by January 26, 1987; (c) the preliminary results for the period April 1, 1985 through March 31, 1986 by March 11, 1987, and the final results for that period by July 10, 1987; and (d) the final decision with regard to Tsubakimoto's request for revocation of the outstanding antidumping order on chains, other than bi-

cycle, from Japan within 30 days after the completion of the review for the period April 1, 1985 through March 31, 1986 and in no event later than August 9, 1987; and (5) ordered the parties to render periodic status reports concerning the progress of the reviews to the Court. Subsequently, the Court, pursuant to motions filed by the parties, has extended: (1) the time within which the Commerce Department must complete the review and publish the final results for the period April 1, 1981 through August 31, 1983 until December 15, 1986; (2) the time within which the Commerce Department must issue the preliminary determination for the period April 1, 1985 through March 31, 1986 until Arpil 28, 1987, and the time within which it must issue the final results for the same period until August 27, 1987; and (3) twice extended the time within which plaintiffs must respond to Commerce Department's questionnaires.

Plaintiffs submitted a notice of appeal of this Court's October 10, 1986 order on December 9, 1986 and a motion for injunction pending appeal on December 24, 1986. In their memorandum of law in support of their motion, plaintiffs essentially contend an injunction should be granted because: (1) they have filed an appeal which is neither premature nor moot and if the injunction is not granted at this time, their rights will be permanently denied as the actions sought to be enjoined will have come to pass and any possible reversal by the Court of Appeals for the Federal Circuit would provide only an "academic victory;" and (2) the standards for granting an injunction pending appeal are met when applied to the facts of this case.

Defendants argue plaintiffs have failed to demonstrate they have filed a proper appeal in that this Court's October 10, 1986 order was not a final appealable order and therefore subject to dismissal for lack of jurisdiction. Defendants also argue the facts of this case do not meet the standards necessary to grant an injunction pending appeal.

DISCUSSION

Plaintiffs have brought an appeal of this Court's Slip Opinion and Order 86–100 claiming "the denial of a preliminary injunction is a decision which is appealable as a matter of right pursuant to 28 U.S.C.A. § 1292(c)(1) and 28 U.S.C.A. § 1292(a)(1).[1] Defendants claim plaintiffs' appeal is improper and subject to dismissal because in the language of plaintiffs' Notice of Appeal they have stated they appeal "the final order entered in this action on October 10, 1986."

[1] The relevant portions of 28 U.S.C.A. § 1292 (1986) read as follows:

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States * * * granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had in the Supreme Court * * *.

* * * * * * *

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which this court would have jurisdiction of an appeal under section 1295 of this title * * *.

This Order, defendants argue, was "not a final decision and judgment". Plaintiffs have not appealed the preliminary injunction (because of a semantical deficiency), but an interim decision which is not final.

This Court is not persuaded by defendants' argument which seems to favor form over substance. It is clear plaintiff is appealing the Court's preliminary injunction denial and such appeal is proper, for the purpose of this application, under 28 U.S.C.A. § 1292.

An injunction pending appeal is determined by the Court in substantially the same manner employed when a preliminary injunction is issued. *British Steel Corp.* v. *United States,* —— CIT ——, Slip Op. 86–119 at 4, (November 12, 1986). The Court, in granting injunctive relief, must take into consideration four factors: (1) the threat of immediate and irreparable harm; (2) the likelihood of success on the merits; (3) the public interest involved in granting or denying the relief; and (4) the balance of hardships on all the parties. *Zenith Radio Corp.* v. *United States,* 710 F.2d 806 (Fed. Cir. 1983); *PPG Industries, Inc.* v. *United States,* —— CIT ——, Slip Op. 87–3 (January 9, 1987). The degree to which this Court must weigh these factors is guided by a "balance of hardship," or sliding scale approach. This methodology is explained below:

> While considering the public interest in all cases, the critical factors are the probability of the irreparable injury to the movant should the equitable relief be withheld, and the likelihood of harm to the opposing party if the court were to grant the interlocutory injunction. Although the extraordinary remedy of a preliminary injunction is not available unless the moving party's burden of persuasion is met as to all four factors, the showing of likelihood of success on the merits is in inverse proportion to the severity of the injury the moving party will sustain without injunctive relief, *i.e.,* the greater the hardship the lesser the showing.

American Air Parcel Forwarding Co. v. *United States,* 1 CIT 293, 299–300, 515 F. Supp 47, 53 (1981).

Plaintiffs again contend they will endure unnecessary and irreparable harm by having to "provide answers to antidumping questionnaires" provided by Commerce. This claim has been addressed in this Court's Slip Op. 86–100 as well as in *Nissan Motors Corp. U.S.A.* v. *United States,* where the Court set forth:

> The mere showing that costs will be incurred in compiling the information does not satisfy plaintiffs' burden * * * The financial burden of completing the questionnaires is not irreparable harm even if resources are diverted from business activity for this purpose. *Hyundai Pipe Co., et. al.* v. *United States,* 10 CIT ——, Slip Op. 86–114 (Nov. 5, 1986). 'The costs borne by the companies in utilizing their own employees is linked directly to the agency action in issuing the questionnaires and consequently is a normal litigation expense.' *Id.* at 9. Even unrecoupable litigation costs do not constitute irreparable injury, * * * nor do

> the expense and disruption associated with delay in administrative proceedings * * *. Furthermore, while the * * * questionnaire format may produce difficulties in plaintiffs' ability to respond, this Court cannot prevent Commerce from employing this * * * methodology when there has been no showing that it is an unreasonable means to obtain the necessary data.

Nissan Motor Corp. U.S.A. v. *United States,* —— CIT ——, Slip Op. 86–140 at 7–8 (December 23, 1986) (some citations omitted).

This Court reiterates its original determination:

> Plaintiffs [sic] imposition does not satisfy prevailing tests for immediate and irreparable harm. No showing has been made that the data is unavailable or unnecessarily burdensome to procure. Plaintiffs should have ready access to data for the periods in question. It is not enough to show merely plaintiffs may incur costs to complete the required questionnaire * * *. Expending resources for this purpose, moreover, is a slight burden in light of the requirement and public need for current data.

UST, Inc., Slip Op. 86–100 at 9–10 (citations omitted).

Of further interest in this matter is the amount of time plaintiffs have allowed to elapse before petitioning this Court for an injunction due to the threat of *immediate* and irreparable harm from having to answer these questionnaires. This "harm" is essentially the same harm complained of in the original petition for the preliminary injunction.

Plaintiffs repeat their counterargument the opinion in *Matsushita Electric Industrial Co., Ltd.* v. *United States,* —— CIT ——, Slip Op. 86–84 (August 12, 1986), appeal docketed, No. 86–1678 (Fed. Cir. September 15, 1986) controls in this case. In *Matsushita,* the Court preliminarily enjoined the Commerce Department from conducting any further administrative reviews until it made a final determination on the final revocation of a dumping finding. However, *Matsushita* is distinguishable in that "the court did not use the traditional four prong analysis and discuss whether, in light of *Freeport Minerals,* plaintiff would be successful as to requiring the ITA to determine final revocation without the benefit of current data." *Nissan Motor Corp. U.S.A.,* Slip Op. 86–140 at 10; accord, *UST, Inc.,* Slip Op. 86–100 at 11.

Plaintiffs raise an additional contention under irreparable harm in that "failure to grant the injunction pending appeal will moot the appeal" and result in a "hollow victory" as addressed by the Court in *British Steel Corp.* v. *United States,* —— CIT ——, Slip Op. 86–119 (November 12, 1986). This Court disagrees with this contention. In *British Steel Corp.,* the Court had denied plaintiffs' request for a preliminary injunction restraining liquidation of certain entries pending a final decision on whether or not Commerce had wrongfully refused to conduct an administrative review covering the time period of those entries. The plaintiffs appealed the Court's opinion and requested an injunction pending appeal to prevent liq-

uidation of the entries until the appellate court had an opportunity to complete its review. The Court granted plaintiffs' request.

The case before us does not deal with the impending liquidation of entries. It is concerned with whether or not plaintiffs will answer Commerce's questionnaires which are necessary for Commerce to complete its responsibilities in conducting the administrative review. This Court has already held the answering of the questionnaire will not result in irreparable harm. Furthermore, if plaintiffs decide not to answer the questionnaires, they may do so, albeit, at their own peril.

Plaintiffs assert if the injunction does not issue, their appeal may well be rendered moot. This Court is cognizant of this argument, but because plaintiffs have failed to meet the four prong test concerning injunctive relief, the issuance of the injunction would seemingly only serve further delay. If plaintiffs wish, they presumably may make an application to the United States Court of Appeals for the Federal Circuit for a stay of this Court's order.

Plaintiffs claim they have met the probability of success test alluding to *Matsushita*, which does not apply in this case. On the contrary, Commerce has published notice of the preliminary results of its review for the periods of April 1, 1981 through September 1, 1983 showing a gradual increasing dumping margin. If these preliminary margins, as defendants explain in their opposition papers, are affirmed in the final determination then the revocation request would be denied. Such findings greatly reduce plaintiffs' chance of success.

Concerning the last two factors to be considered in issuing this injunction, this Court repeats:

> The public interest and balance of hardships favor the denial of this application. Commerce has been entrusted with the duty of administering the antidumping laws, a function which cannot be carried out efficiently with undue judicial interference. With such an important public duty at issue, the burden to plaintiff is small in comparison.

UST, Inc., Slip Op. 86–100 at 10. If plaintiffs can delay interminably the completion of the administrative review by failing to complete the questionnaires, it would seem the public interest will not be served from such delays which impede prompt administrative determinations.

Matsushita has been appealed prior to the appeal of the instant case and resolution of *Matsushita* and the issues involved will satisfy any public interest in the judicial review of the *Matsushita* holding concerning its application to this conflict.

This Court, having considered all factors necessary to determine whether or not an injunction should be issued, concludes plaintiffs have not sufficiently met these four criteria. This Court also concludes, in applying the "balance of hardship" or sliding scale approach to these factors, the relative weighing of all the factors does

not reveal that the hardship alleged is so severe as to justify the lessening of the burden of proof as to success on the merits.

The Court denies plaintiffs' application for a preliminary injunction pending appeal and directs that plaintiffs shall have until 20 days after the filing of this Court's previous order with the Clerk of this Court to respond to and comply with the questionnaires required by Commerce.

(Slip Op. 87–18)

HYUNDAI PIPE CO., LTD., UNION STEEL MFG. CO., LTD., PUSAN PIPE CO., LTD. AND KOREA STEEL PIPE CO., LTD., PLAINTIFFS *v.* U.S. INTERNATIONAL TRADE COMMISSION AND THE UNITED STATES, DEFENDANTS

Court No. 84–6–00763

Before DICARLO, *Judge.*

Plaintiffs, importers of steel products from the Republic of Korea and Taiwan, challenge the final determination of the International Trade Commission (Commission) that an industry in the United States is materially injured by reason of such imports. Plaintiffs claim that the determination is unlawful since the Commission did not consider in its causation analysis the relationship between the size of the dumping margins and the margins by which the imports undersold similar domestic products in the United States.

Held: Congress did not include margins among the factors which the Commission must consider in making its determination. Although the statute does not prohibit margins analysis, past Commission practice does not require that margins be addressed in particular determinations.

[The action is dismissed.]

(Decided February 23, 1987)

Mudge, Rose, Guthrie, Alexander & Ferdon (N.David Palmeter, Donald B. Cameron, Jeffrey S. Neeley and *Kevin B. Dwyer)* for plaintiffs.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile,* Assistant General Counsel, United States International Trade Commission (*Edwin J. Madaj, Jr.*) for defendant.

Schagrin Associates (Roger B. Schagrin and *Paul W. Jameson)* for *amicus curiae* The Committee on Pipe and Tube Imports.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiffs bring an action pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (Supp. III 1985), to contest the final affirmative injury determination of the United States International Trade Commission (Commission) in the antidumping investigation of *Certain Welded Carbon Steel Pipes and Tubes From the Republic of Korea and Taiwan,* 49 Fed. Reg. 19,747 (May 9, 1984). The Court has jurisdiction under 28 U.S.C. § 1581(c) (1982). The Court holds that the determination is supported by substantial evidence and in accordance with law.

I. Background

Following the final determination by the United States Department of Commerce, International Trade Administration (Commerce) that certain small diameter circular welded carbon steel pipes and tubes from Korea and Taiwan, and certain welded carbon steel pipes and tubes of light-walled rectangular (including square) cross sections from Korea were being sold in the United States at dumping margins of .90% and 1.47%, the Commission made its final determination that an industry in the United States is materially injured by reason of such imports. The average underselling margins for these classes of merchandise were 30% and 19%.

Plaintiffs challenge the Commission's determination as not supported by substantial evidence or otherwise in accordance with law because the Commission failed to engage in "margins analysis", *i.e.*, the Commission did not consider in connection with its causation analysis under 19 U.S.C. § 1677(7)(B) (1982), the size of the dumping margins compared to the average under-selling margins.

II. Discussion

The question presented is whether the Trade Agreements Act of 1979 and the practices established by the Commission require the Commission to consider the size of dumping margins in making its final determination.

Section 673 of the Trade Agreements Act of 1979 (1979 Trade Act), 19 U.S.C. § 1673d(b)(1) (1982) (amended 1984) states:

> The Commission shall make a final determination of whether—
>
> (A) an industry in the United States—
> (i) is materially injured, or
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section.

Section 671(7) of the 1979 Trade Act, 19 U.S.C. § 1677(7)(B) (1982) states:

> In making its determinations under sections 1671b(a), 1671d(b), 1673b(a), and 1673d(b) of this title, the Commission shall consider, among other factors—
>
> (i) the volume of imports of the merchandise which is the subject of the investigation,
> (ii) the effect of imports of that merchandise on prices in the United States for like products, and
> (iii) the impact of imports of such merchandise on domestic producers of like products.

Using these criteria, the Commission majority found injury to a domestic industry based on findings of increased volume and market penetration of the subject imports, declining import prices, underselling, and sales lost by the domestic industry because of lower import prices. *Certain Welded Carbon Steel Pipes and Tubes from the Republic of Korea and Taiwan*, Inv. Nos. 731–TA–131, 132, and 138 (Final) USITC Pub. 1519 (April 1984). The one dissenting Commissioner found no causal link between imports and injury to the domestic industry because dumping accounted for only a small part of the underselling margins. *Id.* at 20–27 (Stern, dissenting).

Two of the three commissioners constituting the Commission majority expressed their views on why margin size did not play a role in the injury determination. Chairman Eckes noted (1) the statute specifically requires the Commission to consider the effect of imports in determining causation, (2) despite an ambiguous legislative history, the statute does not mention margins or suggest that the size of margins is dispositive of the causation issue, and (3) while the value of an antidumping order based on a low margin may be subject to question, it is the function of Commerce, and not the Commission, to determine if margins are *de minimis*. *Id.* at 11, n.46. Commissioner Haggart stated, "there is no suggestion in the statutory definition of material injury, which applies both to countervailing and antidumping duty determinations, that the Commission should base its injury finding on the price effect of the subsidy or the LTFV [Less Than Fair Value] margins." *Id.* n.47. Commissioner Haggart also referred to her additional views in *Certain Carbon Steel Products from Spain*, Inv. Nos. 701–TA–155, 157–160, 162 (Final), USITC Pub. 1331 at 26–36 (December 1982), which contains extensive reasoning why the Commission is required to find a causal nexus between imports and material injury, and not between the margin and material injury.

Plaintiffs contend that the interpretation of the Commission majority would contravene legislative history, violate the international agreement which the statute was intended to implement, and reverse established prior practice.

1. Legislative History

Plaintiffs argue that portions of the legislative history of the 1979 Trade Act demonstrate that Congress intended that the Commission consider margins in making its determinations. The Senate Report states:

> The current practice by the ITC with respect to causation will continue under section 735. In determining whether injury is "by reason of" less-than-fair-value imports, the ITC now looks at the effects of such imports on the domestic industry * * *. It also considers, among other factors, the quantity, nature, and rate of importation of the imports subject to the investigation, and how the effects of the margin of dumping relate to the injury, if any, to the domestic industry. Current ITC practice with

> respect to which imports will be considered in determining the impact on the U.S. industry is continued under the bill.

S. Rep. No. 249, 96th Cong., lst Sess. 74 (1979). The report further states:

> For one industry, an apparently small volume of imports may have a significant impact on the market; for another the same volume might not be significant. Similarly, for one type of product, price may be the key factor in making a decision as to which product to purchase and a small price differential resulting from the amount of the subsidy or the margin of dumping can be decisive; for others, the size of the differential may be of lesser significance.

Id. at 88. A third reference to margins analysis is provided in the House Report:

> The ITC must complete its investigation within 120 days. This time frame provides the ITC with at least 45 days after the final affirmative determination by the Authority to complete its investigation in order to allow it to take into account any differences between the Authority's preliminary and final determination (e.g., in dumping margins).

H.R. Rep. No. 317, 96th Cong. 1st Sess. 68 (1979).

Defendant argues that even if ambiguity required the Court to look beyond the statutory language, legislative history does not show that Congress intended to require the Commission to consider the size of margins. "At most, the legislative history, read in light of the statute, might indicate that the size of the LTFV margin may be an appropriate 'other' factor under section 771(7)(B) if the Commission deems that factor to be relevant or probative." Brief for defendant at 22.

The Committee on Pipe and Tube Imports, representing domestic producers of the merchandise, argues as *amicus curiae* that the size of margins may never be considered, based on the language of the statute and parts of the legislative history which state that the Commission must determine whether an industry in the United States is materially injured by reason of imports. However, neither the statute nor those parts of the legislative history cited by *amicus curiae* specifically prohibit the use of margins analysis as a factor in determining injury.

Based on the language of the statute and relevant legislative history, the Court holds that the Commission is not barred from examining margins in carrying out its duties under the 1979 Trade Act. But neither must the Commission always examine margins in making determinations under section 1673d(b)(1). Since Congress identified those factors which the Commission must consider, and did not include margins among those factors, Congress did not mandate that margins analysis be used. *See Maine Potato Council* v. *United States,* 9 CIT ——, Slip Op. 85–69 (1985). At most, the views con-

tained in the Senate and House Reports show that margins may be given weight by the Commission in its determinations.

Since Congress has not required or prohibited margins analysis under the 1979 Trade Act, the Court holds that the statute grants the Commission discretion in determining whether and when it is appropriate to consider margins "among other factors." 19 U.S.C. § 1677(7)(B).

2. International Obligations

Plaintiffs argue that a purpose of the 1979 Trade Act was to implement the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code or Code), *reprinted in* H.R. Doc. No. 153, 96th Cong., 1st Sess. pp. 309–337 (1979). According to plaintiffs, article 3, paragraph 4 of the Antidumping Code requires the Commission to consider the size of dumping margins:

> It must be demonstrated that the dumped imports are, *through the effects of dumping*, causing injury within the meaning of this Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.

Antidumping Code at 5, *reprinted in* H.R. Doc. No. 153, 96th Cong., 1st Sess. at 315 (emphasis added) (footnotes omitted).

Defendant says that the Antidumping Code need not be interpreted to require consideration of margins since a footnote clarifying the phrase 'through the effects of dumping' refers to Article 3, paragraph 2 of the Code, which does not refer to margins:

> With regard to volume of the dumped imports the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

Defendant further contends that if the Code did require that margins be considered, it would conflict with the statute. In that case, the language of the statute would prevail, under sec-tion 3(a) of the 1979 Trade Act, 19 U.S.C. § 2504(a), which states:

> No provision of any trade agreement approved by the Congress under section 2503(a) of this title, nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.

The Court holds that the Code does not unambiguously require that margins be considered as a mandatory factor in the Commission's determinations. The Commission is within its discretion in administering the material injury test so long as its policies are consistent with the terms of the statute. Therefore the Commission's decision not to use margins analysis in this case is not rendered unlawful by the Antidumping Code.

3. Past Commission Practice

Plaintiffs argue that the Commission has used margins analysis in the past and must continue that practice under the rule that "[a]n agency in its deliberations is under an obligation to follow, distinguish, or overrule its own precedent." *Local 777, Democratic Union Organizing Comm.* v. *NLRB*, 603 F.2d 862, 872 D.C. Cir. 1978); *see M.M. & P. Maritime Advancement, Training, Educ. and Safety Program* v. *Department of Commerce*, 729 F.2d 748, 755 (Fed. Cir. 1984); *Greater Boston T. V. Corp.*v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

Margins analysis was used in some injury determinations under the Antidumping Act of 1921, Ch. 14, tit. II, 42 Stat. 11 (1921) (previously codified as amended at 19 U.S.C. § 160 *et seq.* (1976)). Plaintiffs say that the first such determination was in *Vital Wheat Gluten from Canada*, Inv. No. AA 1921–37, TC Pub. 126 (Apr. 1964), where the Commission found no injury to a domestic industry since import prices and quantities would not have been significantly different had the imports been sold at fair value. Plaintiffs argue that in 53 instances under the 1921 Act and several instances under the 1979 Act, margins were considered as a factor in Commission determinations.

According to defendant, the last determination in which a majority of Commissioners used margins analysis was in *Anhydrous Sodium Metasilicate from France*, Inv. No. 731–TA–25 (Final), USITC Pub. 1118 (December 1980). In *Certain Carbon Steel Products from Spain*, Inv. Nos. 701–TA–155, 157–160 and 162 (Final), USITC Pub. 1331 at 14 (December 1982), the following reason was given for not using margins analysis:

> The statute does not direct the Commission to consider the amount of the net subsidy in determining whether there is material injury. At most, the amount of the net subsidy is a factor which the Commission may consider under section 771(7)(B) of the Act.

It is the perpetuation of this policy which plaintiffs allege to be an unlawful violation of past agency practice.

The Court holds that the reasoning given in the *Spanish Steel* case does not contravene legislative intent. The Court further holds that the determination challenged by plaintiffs does not violate a consistent agency practice since margins analysis has never been more than a discretionary factor in determining injury.

Plaintiffs nonetheless argue that in view of the Commission's position that margins may carry some weight in some circumstances, *see* Transcript of Oral Argument at p. 16, the Commission has an obligation to articulate the circumstances when margins will be taken into consideration, and to determine whether those circumstances are present in this case. In other words, plaintiffs would have the Court remand the case to the Commission with instructions that the Commission must discuss the relevance or irrelevance of margins in its determination.

Plaintiffs cite no authority obligating the Commission to expound on discretionary factors not deemed relevant to its determinations. To require the Commission to do so would, in the Court's opinion, elevate margins analysis to the status of a factor which the Commission must consider, contrary to the plain language of the statute.

III. CONCLUSION

The statute does not require the Commission to address margins in injury determinations. Nor has the Commission established a practice requiring margins analysis in determining injury. The Commission is not obligated by statute or by past practice to discuss why margins analysis was not used in a particular determination.

The action is dismissed. Judgment will be entered accordingly. So ORDERED.

(Slip Op. 87–19)

SPRINGFIELD INDUSTRIES CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–01–00087

Before WATSON, *Judge.*

[Defendant's motions to dismiss and to strike denied.]

RESIDUAL JURISDICTION—EMBARGO—EXHAUSTION NOT REQUIRED

A party complaining that the wire strand it imports from South Africa has been unlawfully included by the Treasury Department in the ban on importation of steel from South Africa has stated a claim under the residual jurisdiction of the Court for cases arising from laws of the United States providing for an embargo. The administrative "protest" remedy is futile in these circumstances and need not be exhausted.

(Decided February 24, 1987)

ORDER

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Michael P. Maxwell,* attorney), for defendant.

Busby, Rehm and Leonard, P.C. (*John B. Rehm, Munford Page Hall II,* and *Jonathan Hemenway Glazier,* of counsel,) for plaintiff.

WATSON, *Judge:* Plaintiff, an importer of wire strand from South Africa, brought this action under 28 U.S.C. § 1581(i)(3) for injunctive and declaratory relief against the inclusion of that product in those prohibited from importation under Section 320 of the Comprehensive Anti-Apartheid Act of 1986, (the "Act"), [P.L. 99–440, 100 Stat. 1086, October 2, 1986, as amended by House Joint Resolution 756, P.L. 99–631, October 18, 1986]. At the same time plaintiff made a motion for declaratory judgment and injunction under Rule 57 and moved to shorten the government's time to answer.

The government then moved to dismiss the action and further moved to strike the motion for declaratory judgment. In this opinion the court explains its decision to deny the motions to dismiss and to strike, and then sets out a schedule for the further conduct of the action.

The essence of plaintiff's claim is that the Treasury Department acted unlawfully when, in issuing regulations to enforce the provision of the Act that no steel produced in South Africa be imported into the United States, it included products classifiable under Item 642.11 of the Tariff Schedules of the United States (TSUS). According to plaintiff, wire strand, classifiable under Item 642.11, is not "steel" within the meaning of the Act.

The government argues that the matter complained of is not ripe for judicial review because plaintiff has not exhausted its administrative remedies, which assertedly come into play if plaintiff imports wire strand, if it is classified under Item 642.11 of the TSUS and consequently barred from entry. The government points to the right of plaintiff to protest that eventual classification and, if the protest is denied, the right to bring a conventional action contesting the denial of the protest under 28 U.S.C. § 1581 (a).

The court is not persuaded that the future administrative remedy held out by the government is meaningful or appropriate in these circumstances. The immediate source of plaintiff's grievance is a law in the nature of an embargo. The immediate source of plaintiff's inclusion in the terms of the embargo is a decision of the Treasury Department directing the conduct of the U.S. Customs Service. The specific conduct of the Customs Service in classifying the articles imported by plaintiff will be ministerial only. In short, the classification of these articles is preordained, a protest against that classification is hopeless and the exhaustion of administrative remedies would be futile. These are circumstances in which exhaustion of the administrative "protest" remedy is inadequate, and is therefore not required by 28 U.S.C. § 2637(d). *American Association of Exporters and Importers—Textile and Apparel Group* v. *United States*, 7 CIT 79, 84 (1984); *United States Cane Sugar Refiners Ass'n* v. *Black*, 3 CIT 196, 201 (1982) *aff'd* 69 CCPA 172 (1982).

The government's arguments that the importations may not be classified under Item 642.11, or may escape the effect of the Act if they are found to be produce by a "parastatal" organization, or that

the exception to exhaustion is available only to whole industries, or those attacking an entire piece of legislation, are speculative and unsupported.

Finally, the act of which plaintiff complains was not a "ruling" within the meaning of 28 U.S.C. § 1581(h) in that it did not come about in response to a specific contemplated transaction. This rules out the advance judicial review available under 28 U.S.C. § 1581(h) and leaves the residual jurisdiction of 1581(i) as the appropriate jurisdictional ground for this action. The action is clearly one which, in the terms of § 1581(i)(3), arises from a law of the United States providing for an embargo for reasons other than the protection of the public health and safety.

For these reasons, the motion to dismiss for lack of jurisdiction or lack of ripeness is denied. Consideration of the arguments made by the government on the merits is deferred until the case is ready for a final determination. With this in mind, the court addresses the procedural posture of the case.

As a technical matter, the government's motion to strike is correct in pointing out that the plaintiff's motion for a declaratory judgment was premature. It was essentially the same as a motion for summary judgment, and should have waited until after issue had been joined. Nevertheless, the court has been persuaded that the situation in which plaintiff has been placed, with a very substantial portion of its business affected, justifies expedited treatment and an alteration of normal procedure. Accordingly, in the exercise of its discretion, the court denies the motion to strike and sets the following schedule for further filings on the pending motions: The government shall file and serve its answer to the complaint within 10 days, and its response to the motion for declaratory and injunctive relief shall be served within 22 days of the date of entry of this order, following which pl· ntiff shall have 5 days within which to reply.

(Slip Op. 87–20)

DAEWOO ELECTRONICS CO., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 85–01–00140

Before WATSON, *Judge.*

[Defendant-intervenor's motion to sever and dismiss denied.]

(Decided February 25, 1987)

Arnold & Porter (Thomas B. Wilner, Patrick J. Macrory, et al.) for plaintiffs Samsung Electronics Co. Ltd. and Samsung Electronics America, Inc.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch *(J. Kevin Horgan),* for defendant United States.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson and *J. Eric Nissley)* for defendant-intervenor Zenith Electronics Corporation.

OPINION AND ORDER

WATSON, *Judge:* On December 28, 1984, the Commerce Department published notice of its final determination in the first administrative review of the antidumping duty order covering color television receivers from Korea. 49 Fed Reg. 50420. Five actions were then brought in this Court to challenge that determination, all of which have been consolidated hereunder. Plaintiff/defendant-intervenor, Zenith Electronics Corporation ("Zenith"), has now moved to sever and dismiss one of those actions, *Samsung Electronics Company, Ltd. and Samsung Electronics America, Inc. [("Samsung")]* v. *United States,* Court No. 85–02–00186, for lack of jurisdiction. While acknowledging that Samsung timely filed the summons commencing its action on January 28, 1985, Zenith contends that such filing was fatally defective because it was not signed by an attorney authorized to practice before this Court. Specifically, the attorney who signed the summons, Thomas B. Wilner of the law firm of Arnold & Porter, was not a member of the bar of this Court when he signed the summons, and thus was not authorized to practice or appear before the Court under Court of International Trade ("CIT") Rule 75. Consequently, his signature on the summons did not conform with the signing requirement under CIT Rules 11 and 81(c). Zenith argues that because the summons did not comply with those rules, its filing was a nullity.

In opposition to the motion, Samsung contends that an attorney's failure to sign a pleading, or to be a member of the bar of the Court, is not a defect which nullifies the filing of a pleading for jurisdictional purposes, at least when the defect has been rectified shortly thereafter. It is undisputed that, upon realizing that he was not a member of the CIT bar, Mr. Wilner promptly applied for admission, requesting accelerated consideration, and was admitted on March 4, 1985. (Wilner affidavit, paragraph 4). Samsung also argues that Zenith's motion, which was not filed until November 7, 1986, is barred by laches.

Although the defendant, United States, joins Samsung in opposing Zenith's motion, the Court will assume that Zenith may properly raise this jurisdictional challenge. The government opposes Zenith's motion not on the ground that it consents to jurisdiction, but because it contends that the defect in Samsung's summons was not jurisdictional. Hence, the Court deems it appropriate to decide the motion on its merits. *Cf., Gilmore Steel Corp.* v. *United States,* —— CIT ——, Slip Op. 87–9, at 7 (Jan. 16, 1987).

Recent decisions have spawned some confusion over what sort of filing defects are jurisdictional in nature. In *Georgetown Steel Corp.* v. *United States,* 801 F.2d 1308 (Fed. Cir. 1986), our appellate court declared:

> Since section 1516a(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions * * *. If a litigant fails to comply with the terms upon which the United States has consented to be sued, the Court has no "jurisdiction to entertain the suit." * * *

Id. at 1312 (citations omitted).[1] One might plausibly infer from this language that *any* requirement for commencing an action imposed by Congress upon a private litigant is *ipso facto* jurisdictional (unless Congress has clearly indicated otherwise). Although the instant motion to dismiss is based on the failure of Samsung's counsel to comply with certain rules of this Court, the statutes that specify the filing requirements expressly refer to such rules and require compliance therewith.[2]

The Court of Appeals in *Georgetown Steel,* on the other hand, went on to state:

> The Court of International Trade cannot by rule modify a requirement Congress has imposed. That is precisely what the court's Rule 3(a) attempted to do, by providing that an action under 19 U.S.C. 1516a(a)(2) is "commenced by filing a summons only."

Id. at 1313.[3] The government, in opposition to Zenith's motion, cites this language to argue that "[s]ince Congress has not made the signing of pleadings jurisdictional, that requirement cannot become jurisdictional merely because the Court has included such provision in its rules." (Defendant's brief at 2–3). Samsung advances a similar argument in its brief (at 17).[4] To the extent that the government and Samsung view this Court as powerless to impose mandatory

---

[1] *Georgetown Steel* expressly overruled the CIT decision of *Jernberg Forgings Co.* v. *United States,* 7 CIT 62, *vacated on other grounds,* 8 CIT 245 (1984). In *Jernberg Forgings,* the court reasoned that, as between 19 U.S.C. § 1516a(a)(2)(A) (1982) and 28 U.S.C. § 2636(c) (1982), only the filing requirements set forth in the latter provision were intended to be jurisdictional, since only the latter explicitly declared that otherwise the action "is barred." Accordingly, because § 2636(c) only incorporated the 30-day deadline for filing the summons, the court concluded that a party's failure to file a complaint within thirty days thereafter (as required under 19 U.S.C. § 1516a(a)(2)(A)) could be excused for good cause.

[2] 19 U.S.C. § 1516a(a)(2)(A) (1982 and Supp. II 1984) states, in pertinent part:

> * * *Within thirty days after
> (i) the date of publication in the Federal Register of—
> (I) notice of any determination described in clause * * * (iii) * * * of subparagraph (B) * * *
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, *each with the content and in the form, manner, and style prescribed by the rules of that court,* contesting any factual findings or legal conclusions upon which the determination is based. (Emphasis added).

28 U.S.C. § 2632(c) (1982) states:

> A civil action in the Court of International Trade under [19 U.S.C. § 1516a] shall be commenced by filing with the clerk of the court a summons or a summons and a complaint, as prescribed in such section, *with the content and in the form, manner, and style prescribed by the rules of the court.* (Emphasis added).

28 U.S.C. § 2636(c) (1982 and Supp. II 1984) states:

> A civil action contesting a reviewable determination listed in [19 U.S.C. § 1516a] is barred unless commenced *in accordance with the rules of the Court of International Trade* within the time specified in such section. (Emphasis added).

[3] The Federal Circuit's characterization of CIT Rule 3(a) is perhaps unfair. The quoted language accords with the reading of 28 U.S.C. § 2632(c) set forth in the legislative history (*see* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 53 (1980)), which the Court of Appeals apparently overlooked. It would seem, therefore, that Rule 3(a) can as easily be reconciled with the holding of *Georgetown Steel* as can the language of § 2632(c).

[4] Samsung also seeks support from CIT Rule 1, which states in part: "The rules shall not be construed to extend or limit the jurisdiction of this court." That sentence was modeled after Rule 82 of the Federal Rules of Civil Procedure. *See also* Rule 1, Federal Rules of Appellate Procedure. The Supreme Court has construed such language as a stricture against applying rules to alter subject matter jurisdiction or substantive rights. *Mississippi Pub. Corp.* v. *Murphree,* 326 U.S. 438, 443–46 (1946). It does not proscribe procedural requirements that may incidentally impact on jurisdiction.

procedural requirements, such a view of course goes beyond the holding of *Georgetown Steel* and appears difficult to square with Congress' repeated references to the CIT Rules in the jurisdictional statutes.

In *NEC Corp.* v. *United States,* 9 CIT 557, 662 F. Supp. 1086 (1985), *rehearing denied,* 10 CIT ——, 628 F. Supp. 976 (1986), this court dismissed an action brought under 19 U.S.C. § 1516a(a)(2) because the plaintiff did not satisfy the requirements for filing its summons under CIT Rule 5(g) until after the thirty-day time limit elapsed. The Federal Circuit affirmed, stating:

> The summons is to be filed in a manner prescribed by the Rules of the Court of International Trade. 19 U.S.C. § 1516a(a)(1) [sic]. The rules prescribing the manner and method for filing a summons constitute terms and conditions upon which the United States waves its sovereign immunity. Suit is barred unless the summons is filed in conformity with these rules. 28 U.S.C. § 2636(c).
>
> Contrary to the NEC assertion that deviation from the Rules of the Court of International Trade may be subject to excuse and remedied upon equitable principles, the requirement of a properly and timely filed summons is a requisite of jurisdiction which cannot be waived * * *. The terms of the government's consent to be sued in any particular court define that court's jurisdiction to entertain the suit * * *. Conditions upon which the government consents to be sued must be strictly observed and are not subject to implied exceptions * * *.

806 F.2d 247, 248–49 (Fed. Cir. 1986) (citations omitted), *denial of reh'g en banc vacated,* Order (Jan. 13, 1987). This language, at the very least, casts doubt on the proposition that formal requirements imposed by court rule cannot be considered mandatory. Samsung and the defendant point out, however, that the rule violation which defeated the filing of the summons in *NEC*—the lack of "proper postage" required under Rule 5(g)—is a requirement specified in the statute that authorized the court to promulgate the rule, 28 U.S.C. § 2632(d). They suggest, generally, that only formal requirements explicitly imposed by statute may be viewed as mandatory and jurisdictional.

The Court declines to make such a sweeping general pronouncement. By the same token, it clearly goes too far to suppose Congress intended that any discernible deviation from the "form, manner, and style prescribed by the rules of [this] court" in the filing of a summons or complaint constitutes a jurisdictional defect if not corrected by the filing deadline. Such a construction would lose sight of the basic function of procedural rules "to serve as a useful guide to help, not hinder, persons who have a legal right to bring their problems before the courts." 346 U.S. 946 (1954) (separate statement of Justice Black upon adoption of revised Supreme Court Rules). At least where it is not apparent from the language or con-

text of the rule involved that compliance is essential to an effective filing, the Court will not view non-compliance as *per se* fatal.

CIT Rule 11 requires that every pleading be signed by an individual "attorney of record". It is reasonable to construe this requirement *in pari materia* with Rule 75 which restricts practice and appearances before the Court to attorneys admitted to the CIT bar. Accordingly, for an attorney's signature to comply with Rule 11, the attorney must be a member of the CIT bar. Rule 11 goes on to provide, however:

> If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

CIT Rule 11, by its terms, therefore, does not contemplate that non-compliance voids the filing of a pleading. Rather, an unsigned pleading need not be stricken if "it is signed promptly after the omission is called to the attention of the pleader." To the extent that a pleading signed by an attorney not then admitted to the CIT bar constitute a pleading "signed in violation of [Rule 11]",[5] the rule only calls for "an appropriate sanction", which plainly need not include striking the pleading.

At the time the summons at issue was filed, Samsung's attorney, Mr. Wilner, was a member of the bars of New York, Pennsylvania and the District of Columbia, and was admitted to practice before several federal courts including the Supreme Court. Zenith does not dispute that Wilner was eligible and qualified at that time for admission to this Court's bar. Moreover, several other members of Wilner's law firm, Arnold & Porter, were then members of the CIT bar. The case at bar is thus readily distinguishable from cases cited by Zenith in which a corporate party bringing an action was not represented by an attorney. *E.g., Beddy G. Cury, Curly Top, Inc.* v. *United States,* 85 Cust. Ct. 120 (1980); *S. Stern, Henry & Co.* v. *United States,* 48 Cust. Ct. 430 (1962), *aff'd,* 51 CCPA 15, C.A.D. 830 (1963), *cert. denied,* 377 U.S. 909 (1964). It is further undisputed that Wilner promptly applied for admission to the CIT bar after realizing he was not a member, and has been admitted to practice in this Court since March 4, 1985. In short, Wilner's failure to be a member of the CIT bar when he signed Samsung's summons was a mere technical defect which was promptly cured and which has neither prejudiced nor misled anyone. Under the circumstances, the Court

[5] The standard context in which the identical language in Rule 11 of the Federal Rules of Civil Procedure has come into play is where the signer has failed to make a "reasonable inquiry" into the factual or legal basis of the pleading, motion or other paper. *E.g., Eastway Construction Corp.* v. *City of New York,* 762 F.2d 243, 252–54 (2d Cir. 1985).

concludes that the summons was not void; that it should not be stricken and need not be refiled; and that no other sanction is warranted.

The Court's ruling is in line with decisions of numerous other federal courts which have refused to treat a pleading or motion filed by an attorney not admitted to practice in the court as a nullity. *E.g., Schifrin* v. *Chenille Mfg. Co., Inc.*, 117 F.2d 92, 94 (2d Cir.), *cert. denied,* 313 U.S. 590 (1941); *Becks* v. *Turner,* 68 F.R.D. 466 (E.D.N.Y. 1975); *Pavlak* v. *Duffy,* 48 F.R.D. 396, 398 (D. Conn. 1969); *MacNeil* v. *Hearst Corp.,* 160 F. Supp. 157 (D. Del.1958); *Stevens* v. *Gertz,* 103 F. Supp. 760, 762 (W.D. Mich. 1952). Courts have likewise declined to dismiss actions against the United States due to comparable defects in the initial pleading. *See, e.g., Simons* v. *United States,* 497 F.2d 1046, 1049 (9th Cir. 1974); *Yuri Yajima* v. *United States,* 6 F.R.D. 260, 262 (E.D.N.Y. 1946).

In light of the above holding, the Court need not address Samsung's claim of laches.

For the foregoing reasons, it is ORDERED that Zenith's motion to sever and dismiss Court No. 85–02–00186 is hereby DENIED.

Index

U.S. Customs Service

Treasury Decisions

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade

☆U.S. G.P.O. 1987-181-118:40029